January 20, 2006

Office of Indian Energy and Economic Development
Attn: Section 1813 ROW Study
1849 C Street, NW
Mailstop 2749-MIB
Washington, DC 20240

Section 1813 of the Energy Policy Act of 2005 ("the Act") requires that the Department of the Interior and the Department of Energy ("the Departments") conduct a study regarding energy rights-of-way on tribal lands ("the study"). In response to the December 29, 2005 Federal Register notice, 70 Fed. Reg. 77178, requesting public comment on the Departments' proposed plan for conducting the study, preparing a report to Congress, and "any other areas of concern," the Nordhaus Law Firm, LLP formally submits the following comments on behalf of the Eastern Shoshone Tribe.

1. Pre-Scoping Meeting/Phone Call Participation.

The proposed work plan states that the Departments intend to conduct a series of pre-scoping phone calls and meetings with "selected tribal leaders, members of the energy industry, appropriate government entities, and affected businesses and consumers" to provide the "detail and direction for the subsequent stages of the work plan." 70 Fed. Reg. at 77179. The Departments' proposed work plan thus depends on a hand-picked group of individuals who will ultimately set the agenda for the "subsequent stages of the work plan." The Departments should recognize that they have trust obligations to *all* tribes. Therefore, if the Departments limit participation to selected tribes or tribal interests the Departments will violate their trust obligations to tribes that are excluded. In order to ensure that their trust obligations are met, the Departments should be required to include the Council of Energy Resource Tribes, the National Congress of American Indians, and any individual tribe that would like to participate in the pre-scoping discussions.

2. Analysis of Historic Rates of Compensation For Energy Rights-of-Way on Tribal Land.

The Departments plan to contract with a Department of Energy National Laboratory to conduct the analysis of historic rates of compensation required by § 1813(b)(1). Because the process of contracting the work out will by its nature require the Departments to lay out in advance the precise scope of the analysis to be undertaken, great care should be taken to define the scope of the analysis in an appropriate fashion.

First, the Departments propose to limit the analysis to pipelines. The language of the Act is more general: "energy rights-of-way," which the Act does not define. If the analysis of historic compensation rates is going to be limited to pipelines, then the report itself must be similarly limited. There can be no valid assumption that all "energy rights-of-way" have been compensated in the same manner as pipelines. Furthermore, the Departments have provided no guidance on what kind of energy-related pipelines are to be studied. Again, there can be no valid assumption that major trunk pipelines have been compensated in the same way as local gathering or distribution pipelines. It is essential that the contract specifically identify and require analysis of compensation for every kind of "energy right-of-way" that will be included in the final report to Congress. In the alternative, the report must be limited to the specific types of "energy rights-of-way" for which data is actually developed through the contract

Second, the Departments state that the analysis will employ a "case study" approach, but nowhere is it explained what this approach will entail. The Departments should:

a) clarify the methodology of the "case study approach," including describing the "cases" or types of "cases" they plan to have analyzed;
b) enumerate the aspects of historic rates of compensation that will be analyzed, and explain how the Departments' analysis will account for the many variables that determined the historic rate of compensation given to any tribe (varying tribes, varying factual contexts, varying time periods, etc.);
c) state the purpose for and objectives of the analysis, including what the data resulting from the analysis will be used for;
d) recognize that any data resulting from a study of historic rates of compensation is meaningless without the proper context in which to view the resulting data, since historic rates of compensation vary widely from tribe-to-tribe for a variety of reasons; and
e) determine what categories of land are considered comparable to Indian land, as well as identify the factors that should be utilized to make this determination, in order to provide context for the results of the analysis.

Finally, in the context of the last point listed above, the Departments should recognize that a study of historical rates of compensation on Indian lands is meaningless unless the rates are placed in the context of historical rates on other comparable lands. The study therefore must identify and evaluate factors that should be considered when determining whether other non-

tribal lands are, in fact, comparable to tribal lands. The work plan seems to assume that compensation rates on tribal land can be compared dollar-for-dollar to rates paid for pipeline rights-of-ways on other types of land, but that is not the case. For example, it is important to take into account that tribal lands are not comparable to public domain land. Public domain land is held for the *benefit of the general public* which could, arguably, include energy companies. Unlike public domain land, tribal lands are held for the *exclusive use and benefit of the tribe* to provide a land base for tribal governments to achieve self-determination and economic development for their residents. Tribal land is not necessarily comparable to private land either, since the private land owner does not have to fund governmental obligations to provide public services that tribes have. Without determining the types of lands considered comparable to tribal land, and the factors for adjusting actual compensation paid to reflect identified differences in the nature of different types of land, the study can not produce a useful analysis of historic rates of compensation because the results will be without any meaningful context.

3. Two-Day Nationwide Scoping Meeting

The Departments should postpone the proposed two-day nationwide scoping meeting tentatively scheduled for February 2006. The preparation of comments and presentations by affected groups will be a time-consuming endeavor and attendance at the meeting will depend on tribes having adequate notice. As mentioned above, the Departments should recognize that they owe trust obligations to all tribes and each interested tribe should be given a reasonable opportunity to be present and to comment. Since comments in response to the proposed work plan are due on January 20, 2006, tribes and tribal organizations should be given more time to prepare for a meeting of such import. If the February 2006 meeting date is postponed, the Departments should also adjust the dates for subsequent scheduled meetings accordingly.

4. Other Areas of Concern.

a. The Act's Mandate That The Study Include Recommendations For Appropriate Standards To Determine Fair and Appropriate Compensation.

The Eastern Shoshone Tribe maintains that the concept of "fair and appropriate" compensation must include the tribe's right, as the landowner, to determine what its own property is worth, through negotiations, and should not be used as a justification for the Departments to propose condemnation of tribal lands. After all, fair market value is not set by a third party but rather is the value a willing seller and willing buyer agree upon with neither under a compulsion to buy or sell. Moreover, the tribe may decide to negotiate for benefits other than cash as part of the compensation for the right-of-way, such as a right to some of the gas or electricity that is being transported, which a condemnation proceeding would preclude. The study also should leave open the possibility that there are in fact alternatives to rights-of-way and should allow tribes to pursue alternative types of agreements. Further, a tribe should have the right to decide against granting a right-of-way, for traditional, cultural or any other reason, which a condemnation proceeding also would preclude.

While the Act calls for recommendations for appropriate standards to determine "fair and appropriate" compensation regarding rights-of-way, the Act also calls for an assessment of tribal self-determination and sovereignty interests affected by applications for rights-of-way. Accordingly, the study must explicitly address these issues, which appear to be missing from the Departments' proposed work plan. In addition, consideration of these issues should include an examination of whether tribal sovereignty and policies of tribal self-determination leave any room to allow for condemnation of Indian lands. This issue can not be addressed simply by imposing a "fair and appropriate" value on an unwilling tribal seller.

b. The Rights-of-Way Included In The Study.

The Act calls for a study of "energy rights-of-way." However, the proposed work plan does not identify the types of rights-of-way the study will include, and does not attempt to identify the significant differences among those types of right-of-way. The final work plan should enumerate the types and/or forms of energy or energy resources that will be considered "energy related" and therefore be included in the study. The final work plan should **also identify if the study is limited to rights-of-way for transportation of energy across tribal land that was generated outside tribal land. In addition, the final work plan should identify if the study will include rights-of-way for gathering lines to transport gas and oil produced on tribal lands to another location outside the tribal land, and rights-of-way for distribution of energy to locations on tribal land.**

It is important to identify the kinds of rights-of-way included in the study because the Departments cannot validly assume it is appropriate to apply the findings relating to one type of right-of-way to another or all types of energy rights-of-way. For example, a tribe's interests in a gas gathering system that serves wells located on tribal land are quite different from a tribe's interests in a right-of-way that only crosses tribal land between the off-reservation source of energy and the off-reservation destination point of the energy. The gathering system is an integral part of the infrastructure needed to develop and market gas produced on the tribe's land pursuant to leases issued by the tribe. How the gathering system is operated has an enormous impact on whether and how the tribe is able to develop its own gas reserves. Simply granting a right-of-way to an outside corporation which has total control over operation of that gathering system may not be the best way to manage and develop the tribe's resources. The tribe has a very strong and legitimate interest in controlling whether a right-of-way for the gathering system will be issued at all, and if so, on what terms.

In short, all rights-of-way are not alike and even all "energy rights-of-way" are not alike. A study of compensation for rights-of-way that does not recognize these differences will be misleading and of no value to Congress. Accordingly, the Departments' final work plan should state with specificity the types of rights-of-way that will be included and, in doing so, recognize that different interests attach to each.

Respectfully Submitted,

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